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(3)

Nos. 06-1084

IN THE

Supreme Court of the United States

TODD RONGSTAD and THE VALKYRIE GROUP, LLC,

Petitioners,

v.

JULIE M. LASSA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF *AMICI CURIAE* THE CENTER FOR COMPETITIVE POLITICS AND THE REASON FOUNDATION IN SUPPORT OF PETITIONERS

MANUEL S. KLAUSNER
LAW OFFICES OF
MANUEL S. KLAUSNER, P.C.
601 West Fifth Street, Suite 800
Los Angeles, CA 90071
213.617.0414

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

The Center for Competitive Politics is a nonprofit 501(c)(3) organization founded in August, 2005, by Bradley Smith, former Chairman of the Federal Election Commission, and Stephen Hoersting, a campaign finance attorney and former General Counsel to the National Republican Senatorial Committee. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process. CCP is interested in this case because it involves a restriction on and deterrent to political communications that will hinder political competition and information-flow and because, in the context of existing restrictions on various forms of election-related communications, it burdens one of the few remaining avenues of free political communication that provides a safety valve relative to the more severe restrictions on other communications.

Reason Foundation is a nonpartisan and nonprofit 501(c)(3) organization, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason Magazine, as well as commentary on its website, reason.com, and by issuing policy research reports, which are available at reason.org. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television. Reason's personnel consult with public officials on the national, state, and local level on public policy issues. Reason selectively participates as *amicus curiae* in cases rais-

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

ing significant constitutional issues. This case involves a serious threat to freedom of speech and association, and contravenes Reason's avowed purpose to advance "Free Minds and Free Markets."

STATEMENT

As the opinion below recognized, the trial court construed this Court's cases to require petitioners to make "a preliminary factual showing of a reasonable probability that compelled disclosure of members' identities would subject them to threats, harassment, or reprisals from either government officials or private individuals." Pet. App. 6a. The opinion below likewise ruled that the initial burden of proof was on the party asserting the First Amendment privilege to "make a preliminary factual showing that at least demonstrates a reasonable probability of an actual chilling effect on First Amendment rights." Pet. App. 24a. Because there was no showing "of particular instances of past or present threats, harassment, or reprisals," and no "pattern of threats or specific manifestations of public hostility against the Alliance [for Working Wisconsin] or similar groups," the opinion below found that Rongstad "failed to make the required preliminary factual showing, [thus] we need not reach the question of whether there are compelling interests here that would outweigh a constitutional privilege." Pet. App. 27a, 29a.

Particularly with respect to the trial court's order to "disclose the identity of anyone who had contributed $100 or more to the Alliance in 2002," Pet. App. 9a, and in light of the fact that petitioner had testified that he was the only person involved in the preparation or distribution of the allegedly defamatory mailer, Pet. 5, that order imposed a wholly improper burden on the First Amendment right of free and anonymous association.

In a rare show of fortitude, Rongstad continued to refuse to identify persons who had contributed to the Alliance but who had nothing to do with the mailer's preparation or distri-

bution, and suffered monetary and other sanctions for having stood on principle. This case is the rare live controversy that continues to present the issue of the burden of proof for resisting disclosure of anonymous association given that the sanctions remain in effect and subject to appeal even though the underlying defamation case has been settled.

SUMMARY OF ARGUMENT

1. The split identified in the petition is well-established, deep, encompasses state and federal courts, divides courts within the Ninth Circuit, and is geographically far-reaching. It thus presents the type of significant conflict that amply warrants this Court's attention.

2. The steep hurdle to the assertion of First Amendment rights erected by the burden of proof applied below and in numerous other courts operates in areas of core political speech and association and, for that reason alone, presents an important national issue that should be resolved by this Court. But the issue also significantly impacts the larger field of campaign finance and the regulation of political speech relating to elections. When the burden on associational anonymity for grass-roots speech such as the political mailer here is viewed in the context of the existing and extensive restrictions on other forms of election-related political speech, that burden poses a broader and synergistic threat to free speech.

Allowing a breach of associational anonymity by the mere filing of a lawsuit and some discovery requests, without even the pretense of a compelling interest in such disclosure, undoubtedly will deter people and organizations from challenging those in, or seeking to gain, positions of power and thus constrict precisely one of the alternative avenues of communication – political pamphleteering and similar non-broadcast speech – that this Court has viewed as a safety valve for free speech when it allowed limitations on more expensive forms of political speech. Allowing that safety valve to become clogged by additional and improper burdens on asserting First

Amendment rights thus threatens a seeming assumption of this Court's campaign finance jurisprudence and compounds the already significant First Amendment burdens on political speech from campaign finance regulation. The issues presented here thus have significance well beyond their immediate application in the defamation context.

3. This Court should take the opportunity now to address the burden of proof for asserting a privilege of associational anonymity because such issues, though arising often at the trial level, rarely make it up to this Court and future opportunities to resolve the split may be few and far between. The burden-of-proof issue presented here typically arises at a preliminary stage of litigation, generally would require an uncertain interlocutory appeal or petition for mandamus to receive timely appellate review, and once resolved at the trial stage will often never see the light of day again given the practical consequences and structural incentives of litigation that make it difficult and often pointless to appeal through multiple courts on the burden of proof itself. It is thus a rare case, such as this one, where a litigant stands on principle, absorbs contempt and other sanctions, and nonetheless continues to fight all the way to this Court with a live controversy. Because the issue will continue to affect First Amendment rights at the trial level even absent effective avenues for appeal, this Court should avail itself of the current petition as a vehicle for resolving the split, rather than wait for some future petition that may be a long time coming.

ARGUMENT

I. The Petition Presents a Question that Has Divided the Federal Circuits and Highest State Courts.

As the petition correctly notes, at 13-17, and as the opinion below partly recognized, Pet. App. 29a n. 21, there is a substantial split among the federal circuits and state high courts over whether a party asserting a First Amendment privilege to withhold the names of anonymous associates or contributors bears the initial burden of proof of particularized harm from disclosure or whether instead the party seeking disclosure bears the initial burden of establishing a compelling interest that will be served by a narrowly tailored disclosure. This issue arises not only in the defamation context, but in the grand jury and administrative investigation contexts as well.

The split presented by this case is deep and well established. On the one side are three courts that correctly require the party seeking disclosure initially to demonstrate a compelling interest that will be served by a narrowly tailored disclosure. *See AFL-CIO* v. *FEC*, 333 F.3d 168, 176 (CADC 2003) (upholding First Amendment challenge to regulation requiring disclosure of documents naming labor union and political party officials, employees, and volunteers by putting the initial burden on government to demonstrate its interest in disclosure despite the absence of compelling evidence relating to reprisals and harassment because such evidence is required "only after concluding that the disclosure requirements at issue survived strict scrutiny as the least intrusive means of achieving * * * compelling government interests"); *NLRB* v. *Midland Daily News*, 151 F.3d 472, 475 (CA6 1998) (affirming denial of enforcement of a subpoena for identities of newspaper's anonymous advertisers because government failed to demonstrate a "substantial state interest" and court held, without requiring particularized proof, that denial of

anonymity would chill anonymous advertising); *Britt* v. *Superior Court*, 20 Cal.3d 844, 854, 864-65 (Cal. 1978) (vacating a discovery order aimed at political associations of plaintiffs and holding that "private association affiliations and activities such as those at issue here 'are presumptively immune from inquisition' * * * and thus the government bears the burden of demonstrating the justification for compelling disclosure"; offering extensive discussion of this Court's cases) (citation omitted).

An additional three courts have similarly placed the burden on the party seeking disclosure to demonstrate a compelling interest furthered by a narrowly tailored disclosure, but then held that the party seeking disclosure had satisfied its burden. *See In re Grand Jury Proceedings*, 776 F.2d 1099, 1102-04 (CA2 1985) (applying "well established" standards to require government initially to show compelling interest with a substantial relation to information sought before requiring proof of "particularized harm" in order to curtail an "otherwise justifiable investigation" into associational relationships; ultimately rejecting asserted privilege and affirming order of civil contempt where government satisfied burden); *Master Printers of America* v. *Donovan*, 751 F.2d 700, 705 (CA4 1984) (holding that failure to establish a "substantial burden" on association from disclosure "is not the end of the inquiry" and that because a "serious claim of infringement has been made" the government must show a compelling interest and narrow tailoring; finding that the government satisfied its burden and enforcing the challenged disclosure requirement), *cert. denied*, 474 U.S. 818 (1985); *In re Grand Jury Subpoenas for Locals 17, 135, & 608*, 528 N.E.2d 1195, 1198-1200 (N.Y.) (upholding enforcement of subpoenas for union membership lists only after finding that information sought is "substantially related to a compelling governmental interest" even absent particularized showing of harm and only a bare assertion of an "inevitable 'chilling effect' on the association rights" of union members that the court found to be

weaker than the effect presumed in other political association cases), *cert. denied*, 488 U.S. 966 (1988).

On the other side of the split are four courts, including the one below, that erroneously require the party asserting the First Amendment privilege initially to establish a probability of harm to the association or its members from the disclosure being sought. *See* Pet. App. 29a (requiring particularized factual showing of harm, finding that petitioner failed to make such showing, and concluding that "we need not reach the question of whether there are compelling interests here that would outweigh a constitutional privilege."); *Dole* v. *Local 375, Plumbers Int'l Union of America*, 921 F.2d 969, 971-72 (CA9 1990) (affirming enforcement of a subpoena for records disclosing contributors to a union fund by placing the initial burden of demonstrating harm on the party asserting privilege, holding that proffered evidence of harm was insufficient to meet that burden, and hence declining to even consider the nature of the government's asserted interest), *cert. denied*, 502 U.S. 868 (1991); *Salvation Army* v. *Department of Community Affairs of the State of New Jersey*, 919 F.2d 183, 201 (CA3 1990) (remanding to allow a First Amendment associational claim to go forward but holding that party asserting First Amendment privilege against disclosing beneficiaries of its services must "present evidence to the district court demonstrating that [such disclosure] * * * will dissuade individuals from participating in its rehabilitation program," and only if such "a prima facie showing" of harm is made will the government then have to demonstrate that its "reporting requirement is narrowly tailored to a compelling interest"); *United States* v. *Comley*, 890 F.2d 539, 543-44 (CA1 1989) (affirming enforcement of subpoena for tape recordings of conversations, holding that party asserting First Amendment privilege must "make a prima facie showing of" a chilling effect from the disclosure before the burden shifts to the government, finding that the party failed to make such a showing, but find-

ing in the alternative that the subpoena was narrowly tailored to serve a compelling interest in any event).

An additional two courts have imposed the initial burden of proof on the party asserting the First Amendment privilege, found or assumed the burden to have been satisfied, and then either resolved the dispute or remanded for further proceedings. *See United States* v. *Citizens State Bank*, 612 F.2d 1091, 1094-95 (CA8 1980) (suggesting that prima facie showing by party asserting privilege had been satisfied but nonetheless vacating and remanding "for a determination of whether compelled disclosure of all the records sought would adversely affect appellants' freedom of association" and requiring a demonstration of a compelling need only "if appellants' First Amendment rights would be infringed by forcing the bank to divulge certain documents"); *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 376-77 (Tex. 1998) (requiring party asserting privilege to "bear[] the initial burden to make a *prima facie* showing that the trial court's orders will burden First Amendment rights" by showing a "'reasonable probability that the compelled disclosure will subject them to threats, harassment, or reprisals,'" but then granting mandamus to block discovery of contributor list because burden was met) (citation omitted).[2]

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[2] The Tenth Circuit has been somewhat ambiguous regarding its view of the burden of proof. In *In re Grand Jury Subpoena to First Nat'l Bank, Englewood, Colo.*, 701 F.2d 115, 117, 118-19 (CA10 1983) it simultaneously suggests a presumed deterrent effect and a "readily apparent" chilling effect from compelled disclosure of membership lists sufficient to require the government to demonstrate a compelling interest and narrow tailoring, yet also remands with instructions to determine whether a subpoena "would likely chill associational rights" before requiring the government to show a compelling need for the membership documents.

The Supreme Court of Washington is likewise somewhat ambiguous regarding the nature of the threshold burden. In *Snedigar* v. *Hodderson*, 786 P.2d 781, 785-86 (Wash. 1990) (*en banc*), the court required the party seeking disclosure to demonstrate a compelling interest even in the face of "a speculative claim of harm" by the party asserting the First Amendment

All told, on the preliminary issue of the burden of proof in associational disclosure cases, six courts (CADC, CA2, CA4, CA6, Cal., and N.Y.) place the burden on the party seeking disclosure of member or contributor information from private associations, six courts (CA1, CA3, CA8, CA9, Tex., and Wisc.) place the burden on the party asserting a First Amendment privilege to the privacy of such associations, and two courts (CA10 and Wash.) are somewhat ambiguous as to where they place the burden. The split cuts across the state and federal appellate courts, divides state and federal courts within the Ninth Circuit, and extends across geographic jurisdictions from coast to coast. It thus presents an important conflict among the federal circuits and state highest courts that threatens the uniformity of federal constitutional law and warrants this Court's attention.

II. The Petition Presents an Important National Issue that Should Be Resolved by this Court.

As the petition correctly notes, and this Court has frequently held, anonymity and associational privacy are important aspects of the freedom of speech and important conditions for allowing such freedom to exist. Pet. 17. Forced disclosure of anonymous contributors or associates by definition imposes *some* burden on First Amendment rights, and to require parties initially to *prove* the concrete adverse effects of disclosure – before disclosure has even occurred – simply shifts power to the government and public figures seeking to expose and punish their critics. The effects of that shift will be to discourage public criticism of those already in a position of power and deter political involvement and association by those who lack such power. As the opinion below recog-

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privilege. Although the court rejected any need for proof that disclosure would "in fact impinge" on First Amendment rights, it articulated a test that the party asserting privilege "need demonstrate only some probability that its First Amendment rights will be harmed by disclosure in order to make a successful showing of associational privilege." *Id.* at 786.

nized, "[t]here is no shortage of cases involving claims of defamation by candidates for public office against those who have criticized them," Pet. App. 17a n. 14 (citing cases), notwithstanding the fact that such cases are rarely, if ever, successful, Pet. App. 60a n. 40 (Prosser, J., dissenting). That effect on political speech and association is reason enough to view this case as important.

A further reason why this case is of particular national importance, however, has to do with the synergies between the burdens on speech in this case and the increasing restrictions permitted by this Court's campaign finance jurisprudence. As this Court well knows, broadcast speech related to candidates and elections is highly regulated. *See McConnell* v. *FEC*, 540 U.S. 93 (2003) (upholding numerous restrictions on electioneering communications and other election-related activities). In upholding such regulation, this Court has seemed to minimize the resulting burden on speech by noting the existence of alternative avenues of communication that (for now) remain less regulated. *Id.* at 139, 203-04 (relying on alternative avenues and opportunities to engage in the expressive activities being restricted by BCRA to downplay the First Amendment impact).[3]

Indeed, it has become a standard argument of those seeking further to suppress the discussion and criticism of candidates for office that even greater restrictions on political speech and association are permissible so long as there are supposedly adequate alternative avenues of communication

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[3] *Amici* do not agree with the lenient approach this Court has used in its past campaign finance decisions, and have submitted numerous briefs to this Court to that effect. Under *amici's* view, even a wide-open alternative avenue of communication does not justify content-based restrictions on core political speech via broadcast avenues of communications. But assuming, *arguendo*, this Court's adherence to some of its past analysis on the point, the loss of alternative avenues takes on even greater importance given the synergy with existing federal and state restrictions on broadcast and other forms of political communication.

available elsewhere. *See, e.g.*, FEC Appellant's Br. in *FEC* v. *Wisconsin Right to Life, Inc.*, No. 06-969 (Feb 23, 2007), at 35-36; McCain Appellants' Br. in *McCain* v. *Wisconsin Right to Life, Inc.*, No. 06-970 (Feb.23, 2007), at 29-31.

Insofar as this Court's campaign finance jurisprudence indeed depends, even in part, on the supposed adequacy of such alternative avenues of communication, the issue presented in this case becomes an extremely serious national issue in that it threatens to undermine one of the most longstanding and time-honored alternative avenues of political criticism – political pamphleteering. As various forms of political communication become more constrained, the importance of the remaining forms of communication, such as the one in this case, is magnified. Indeed, the relatively inexpensive and accessible form of political communications and association threatened in this case is one of the few remaining means for persons to associate together and spread their political message without fear of the regulatory minefield surrounding other types of broad-reaching political speech. If that avenue of political speech and association becomes constricted by the too-easy loss of associational anonymity, the predicate for this Court's rulings on a variety of campaign finance restrictions is cast into doubt and the burden on speech from those other restrictions is magnified and compounded by the clogging of a free-speech safety valve.

Given the synergies between restrictions on the political speech and association in this case and restrictions on larger and more broad-based political activities regulated by campaign-finance laws, the issue in this case has significance well beyond the discrete context of political defamation cases. It instead has ripple effects on the entirety of the regulatory regime for all political speech related to candidates for election.

III. This Court Should Avail Itself of the Current Opportunity to Address the Questions Presented Given the Uncertain Path To Appellate Review in Other Cases Raising the Same Issues.

This Court should grant this particular petition for the further reason that it is one of the few opportunities this Court likely will have to address the burden of proof for asserting a privilege of associational anonymity. Cases presenting the preliminary, though important, issue of the burden of proof for asserting a that privilege are not likely to reach this Court with any regularity given the practical and structural impediments for appealing the issue this far.

Regardless on which party the initial burden is placed, if the party satisfies that threshold test, there is no occasion to appeal the *burden-of-proof* issue even if the party subsequently loses on the full balancing of interests. If the party bearing the burden fails the threshold test, there is the theoretical opportunity to appeal, but practical difficulties may keep such appeals largely a matter of theory instead of reality. For example, if the party seeking disclosure fails at the threshold and does not obtain such disclosure, the issue is interlocutory and not likely subject to exceptions for immediate appeal, at least in the context of defamation cases. The case thus would proceed (or not, if it were merely a means to harass a critic) and at the conclusion or settlement of the case there would be little incentive and little gain in pursuing an expensive appeal up to this Court.[4]

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[4] The one scenario in which the issue seems more likely to be appealed is when a court denies enforcement of a government subpoena. While those cases indeed present the burden-of-proof issue, and the government has different and stronger incentives to appeal, they do not often present the issue in the especially pointed context of this case – a candidate seeking to unmask contributors to a vocal critic – and hence would not necessarily highlight the seriousness of the First Amendment issues involved.

If it is the party resisting disclosure that fails the threshold test, an interlocutory appeal or petition for mandamus might well be available, but such avenues are uncertain at best, were of no use in this case, increase the expense and burden that may have been the point of the suit in the first place, and thus are not reliable vehicles for reaching this Court. Absent such immediate appeal, if the party complies with the discovery order and discloses its membership or contributors, the "cat is out of the bag" and cannot be stuffed back in. Any appeal at the end of the case thus would be of little direct benefit and would again simply compound the expense and burden of the suit. A party could, of course, refuse to comply with the order and accept contempt and other sanctions, as petitioner did in this case, but, again, such a path is uncertain and requires unusual fortitude and resources to take the risk of such penalties. The rare litigants, like Rongstad, who do take that path, thus offer this Court the few opportunities it may have to review a case where the burden of proof is not only squarely presented, but was in fact dispositive of the dispute over disclosure. This Court should be reluctant to let such an opportunity pass.

In deciding whether to grant the petition, this Court thus should remain mindful of the simple point that the burden-of-proof issue can arise often at the trial level and have significant impact on the parties and the First Amendment, but, as a practical matter, the issue is unlikely to be presented to this Court with any frequency. Given the likely paucity of petitions, the importance of the issues presented, and the deep and longstanding split involved, this Court should grant the current petition rather than wait for some other case that may be a long time coming.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

MANUEL S. KLAUSNER
LAW OFFICES OF
MANUEL S. KLAUSNER, P.C.
601 West Fifth Street, Suite 800
Los Angeles, CA 90071
213.617.0414

Counsel for Amici Curiae

Dated: April 11, 2007.